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May 20, 1998

Ms. Magalie Roman Salas, Secretary
Federal Communications Commission
Office of the Secretary
1919 M. Street, NW Room 200
Washington, DC 20554

Re: Ex parte - CC Docket No. 94-129 (Unauthorized Carrier Changes)

Dear Ms. Salas:

On May 19,1998, I telephoned Tom Power, Legal Advisor to Chairman Kennard, Kyle Dixon, Legal Advisor to Commissioner Powell, Kevin Martin, Legal Advisor to Commissioner Furchgott-Roth, Jim Casserly, Senior Legal Advisor to Commissioner Ness, and Paul Gallant, Legal Advisor to Commissioner Tristani, to advise them that I would be delivering a copy of the enclosed decision of the Michigan Public Service Commission. In this decision, the Michigan Public Service Commission finds that Ameritech Michigan violated a prior Michigan Commission decision intended to reduce slamming. This decision further supports AT&T's previous demonstration in this proceeding that there should be a neutral third party administrator for the carrier selection and PIC freeze process. I also reiterated that the Commission's current rules regarding customer compensation are appropriate. Providing customers with free calling would needlessly create improper incentives.

Two copies of this Notice are being submitted to the Secretary of the Commission in accordance with Section 1.1206(a)(2) of the Commission's Rules.

Very truly yours,

Enclosure
cc: Mr. T. Power
Mr. J. Casserly
Mr. K. Martin
Mr. K. Dixon
Mr. P. Gallant

NEWS RELEASE

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LANSING, May 11. The Michigan Public Service Commission today found, by a 2-1 vote, that Ameritech Michigan failed to implement certain long distance service provider change orders submitted by MCI Telecommunications Corporation in violation of a Commission August 1, 1996 order. In today's decision, the Commission ordered Ameritech Michigan to cease and desist from further violations of the August 1, 1996 order and to pay reasonable expenses, including attorney fees incurred by MCI, in connection with this case. Commissioner John Shea concurred in part and dissented in part to today's order.

On October 20, 1997, MCI filed a complaint against Ameritech Michigan alleging that Ameritech Michigan was in violation of the August 1996 Commission order. MCI also sought compensatory damages from Ameritech Michigan. The August 1996 order directed Ameritech Michigan to permit customers who had previously elected "PIC Protection", which is designed to prevent unauthorized changes in their intraLATA telephone service provider,* to verify their intent to change that service providers by a number of procedures specified in the Commission order. The options included independent third-party verification and the use of a written letter of authorization, as well as three-way conference calls with the consent of the customer. MCI contended that, contrary to the Commission order, Ameritech Michigan would only permit customers with "PIC protection" in place to change their intraLATA service provider through three-way conference calls. MCI further claimed Ameritech Michigan made these three-way calls unpleasant and difficult for customers. MCI asserted that Ameritech Michigan's improper actions led to its loss of more than 32,000 intraLATA customers. The Commission concluded that Ameritech did indeed violate its August 1996 order by not processing carrier changes through letters of authorization, third-party verification and repeatedly making improper use of three-way calls. The Commission found, however, that MCI failed to meet its burden of proof regarding

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compensatory damages.

"The Commission fully supports measures to eliminate and reduce slamming," said Chairman John Strand. " Today's order does not diminish the protections in place for Michigan's consumers. The Commission continues to support a fair and competitive marketplace for Michigan telephone customers but will not endorse measures that use slamming as an excuse to perpetuate anti-competitive actions. Today's order will benefit Michigan consumers by requiring Ameritech Michigan to quickly implement customer choice for telephone service," noted Strand.

The MPSC order follows its earlier August 1996 order and similar orders in 1997 from the Ohio Public Utilities Commission and a 1996 order from the Illinois Commerce Commission.

Commissioner John Shea filed a separate opinion, concurring in part and dissenting in part. He agreed with the majority that Ameritech Michigan had not followed the Commission's August 1996 order but would not have awarded attorneys fees.

The MPSC is an agency within the Department of Consumer and Industry Services.

Case No. U-11550
May 11, 1998
(MCI's complaint against Ameritech Michigan on Primary Interexchange Carrier changes)

* An intraLATA telephone service provider provides long distance telephone service within a LATA which is a geographic area similar in size and location to an area code. There are five LATAs in Michigan: Detroit, Grand Rapids, Lansing, Saginaw and Upper Peninsula.

(MPSC press releases and the complete text of Commission orders are available on the world wide web @http://ermisweb.cis.state.mi.us/mpsc)

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

* * * * *

In the matter of the complaint of **MCI TELECOMMUNICATIONS CORPORATION** against **AMERITECH MICHIGAN.**	))))	Case No. U-11550

At the May 11, 1998 meeting of the Michigan Public Service Commission in Lansing, Michigan.

PRESENT: Hon. John G. Strand, Chairman
Hon. John C. Shea, Commissioner
Hon. David A. Svanda, Commissioner

OPINION AND ORDER

I.

HISTORY OF PROCEEDINGS

On October 20, 1997, MCI Telecommunications Corporation (MCI) filed a complaint against Ameritech Michigan pursuant to the provisions of 1991 PA 179, as amended by 1995 PA 216, MCL 484.2101 et seq.; MSA 22.1469(101) et seq., (the Act). In Count I of its complaint, MCI alleged that Ameritech Michigan violated the Commission's August 1, 1996 order in Case No. U-11038 (the August 1 order) by refusing to implement certain primary interexchange carrier (PIC[1]) change orders submitted by MCI on and after April 1, 1997. In Count II, MCI asserted that although the August 1 order authorized the use of three-way conference calls as a means of

[1]A PIC is the toll carrier that the customer chooses to handle its 1+ toll dialing.

verifying that a customer wanted to change service providers, Ameritech Michigan was improperly using those three-way calls to dissuade customers from leaving Ameritech Michigan's intraLATA service. On November 14, 1997, Ameritech Michigan filed its answer and affirmative defenses.

Pursuant to due notice, a prehearing conference was held on November 18, 1997 before Administrative Law Judge Robert E. Hollenshead (ALJ). Evidentiary hearings were held on February 2, 3, 8, and 9, 1998. MCI and Ameritech Michigan each filed initial briefs and reply briefs on February 17 and March 3, 1998, respectively. The record consists of 1,073 pages of transcript and 66 exhibits.

The ALJ issued a Proposal for Decision (PFD) on March 31, 1998. The parties filed exceptions to the PFD on April 7, 1998 and replies to exceptions on April 14, 1998. In addition, on April 9, 1998, Ameritech Michigan filed a motion to reopen the record. On April 27, 1998, MCI filed its response to that motion.

II.

BACKGROUND

The genesis of this proceeding is a bill insert that Ameritech Corporation[2] mailed to its approximately 12 million residential and small business customers in Michigan and four other states during December 1995. The bill insert, which was sent approximately one month before the implementation of intraLATA dialing parity in Michigan, urged customers to sign up for Ameritech Michigan's PIC protection program by filling out and returning a form that was attached to the insert. According to the insert, enrollment in the PIC protection (or PIC freeze) program would reduce the

[2]The decision to send the bill insert was made by Ameritech, the parent corporation of Ameritech Michigan.

risk of being slammed[3] by requiring that any change in a Michigan-based customer's service provider must be preceded by written or oral authorization going directly from the customer to Ameritech Michigan.

On February 14, 1996, Sprint Communications Company L.P. (Sprint) filed a complaint in Case No. U-11038 alleging that the December 1995 bill insert was deliberately misleading and anticompetitive in violation of the Act. Specifically, Sprint claimed that although the bill insert referred only to changes in interLATA service, the PIC protection program also applied to intraLATA and local services, both of which are provided by Ameritech Michigan. According to Sprint, the language and timing of the bill insert had the effect of interjecting confusion into the intraLATA presubscription process, impeding or delaying customers' selection of a competing intraLATA carrier, and hindering the ability of interexchange carriers like Sprint, MCI, and AT&T Communications of Michigan, Inc., (AT&T) to compete in the intraLATA market. As such, Sprint asserted, what Ameritech Michigan portrayed as a solution to interLATA slamming was in fact a mechanism to tie intraLATA and local service customers to Ameritech Michigan before those customers ever had a choice of alternative service providers.

Sprint's complaint culminated in the August 1 order, where the Commission (with one Commissioner dissenting) found that Ameritech Michigan's December 1995 bill insert violated both the Act and prior Commission orders. Specifically, the Commission concluded that the insert was "deceptive and misleading" because it failed to inform customers that the PIC freeze would apply to all of a customer's services, including intraLATA and local exchange services. August 1 order, p. 5. The Commission further found that Ameritech Michigan's use of the bill insert was anticompetitive

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[3]"Slamming" is the illegal practice of changing a customer's telecommunications provider or providers without the customer's knowledge and consent.

"because it created new hurdles to the exercise of the customer's decision to change providers just as alternatives were becoming available." Id., p. 12. Without Ameritech Michigan's PIC protection, the Commission noted, the customer can call a new service provider and make arrangements to take service, and the new provider can work directly with Ameritech Michigan to implement the change; however, with the protection in place, the customer must contact not only the new service provider, but Ameritech Michigan as well. The Commission went on to state that:

> The bill insert, and PIC protection, become even more anticompetitive if the interexchange carriers' fears are justified that Ameritech Michigan will delay requests from customers to change providers and that it will use the contact as an opportunity to try to dissuade the customer from leaving Ameritech Michigan's service.

Id., p. 13. The Commission therefore concluded that the bill insert violated Sections 205(2), 312b, and 502(a) of the Act, as well as the Commission's orders in Case No. U-10138 (which mandated the implementation of intraLATA dialing parity). It further found that Ameritech Michigan's use of the bill insert violated the competitive purposes of the Act as expressed in Section 101.[4]

The August 1 order went on to require Ameritech Michigan to draft a corrective bill insert that would, among other things, inform customers of the order, outline the differences among the various services covered under the PIC protection program, and advise customers of the advent of competition in the provision of those services. It also ordered Ameritech Michigan not to apply PIC protection requests to intraLATA and basic local exchange services until six months after mailing the corrective bill insert unless the customer had first affirmatively selected a provider for those services and then requested PIC protection.

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[4]MCL 484.2101(2); MSA 22.1469(101)(2) provides that the purposes of the Act are, among other things, to "encourage competition to determine the availability, prices, terms, and other conditions of providing telecommunication services" and to "encourage . . . the entry of new providers" into Michigan's telecommunications market.

The Commission further ordered Ameritech Michigan to permit the verification of PIC changes by any procedure approved in the March 10, 1995 order in Case No. U-10138, where the Commission adopted all PIC verification options authorized by the Federal Communications Commission (FCC). Those options included independent third-party verification (TPV) and the use of a written letter of authorization (LOA). In imposing this requirement, the Commission noted that "Ameritech Michigan is not free to invalidate PIC change procedures that the FCC and this Commission have approved." August 1 order, p. 22. The Commission went on to order Ameritech Michigan also to permit verification through the use of three-way conference calls with the consent of the customer. In so doing, the Commission pointed out that "Ameritech Michigan will need to find a way to verify the identity of the customer that does not require the disclosure of confidential information" and that if Ameritech Michigan finds that it must discuss confidential or proprietary information with the customer, "it may do so in another telephone conversation." Id., p. 22, fn. 14. Finally, in response to concerns raised by Sprint, MCI, and AT&T, the Commission held that "if a customer with PIC protection calls to change providers, Ameritech Michigan shall not use that contact to try to persuade the customer not to change providers." Id., p. 22.

Pursuant to the Commission's directive, Ameritech Michigan issued a corrective bill insert to all of its residential and small business customers. Because this was accomplished by the close of September 1996, the six-month moratorium imposed by the Commission's order expired on March 31, 1997.

III.

POSITIONS OF THE PARTIES

MCI asserts that since April 1, 1997, Ameritech Michigan has refused, on accounts that have PIC protection, to implement any intraLATA PIC change orders that have been verified through the use of TPV or LOA. Instead, MCI contends, Ameritech Michigan will switch these accounts over to MCI's intraLATA service only if the change order is communicated to it through use of a three-way call. According to MCI, this is in direct violation of the August 1 order. Worse yet, MCI argues, Ameritech Michigan has exhibited a pattern of behavior during its three-way calls that is precisely what the Commission ordered it not to do. Specifically, MCI asserts that Ameritech Michigan has (1) used these contacts to try to persuade the customer not to change service providers, (2) refused to participate in these calls by leaving MCI and the customer on hold for unreasonably long periods of time or by hanging up before verification of the service transfer can be completed, (3) made use of confidential customer data, such as the customer's calling frequency and patterns, in an attempt to make the customer change its mind, and (4) used confidential customer information during these calls in an attempt to sell the customer additional Ameritech Michigan services and features to which the customer does not currently subscribe.

According to MCI, Ameritech Michigan's actions resulted in the improper rejection of 24,448 residential and 8,039 small business intraLATA customer change orders submitted on and after April 1, 1997. MCI claims that its inability to serve those 32,487 customers due to Ameritech Michigan's wrongful actions led to lost profits of $1,173,608. See Exhibit C-11. MCI further contends that Ameritech Michigan's violations of the Act and past Commission orders continue to this day. It therefore argues that, among other remedies, the Commission should (1) issue a cease

and desist order, (2) require Ameritech Michigan to immediately process all intraLATA PIC change orders that were verified through the use of either TPV or LOA since April 1, 1997, (3) award compensatory damages to MCI of $1,173,608 to replace its lost profits, (4) impose a fine of up to $40,000 per day from April 1, 1997 to the present, and (5) assess costs and attorney fees against Ameritech Michigan.

Although conceding that it ceased processing intraLATA change orders that were verified under TPV or LOA after March 31, 1997, Ameritech Michigan contends that its decision to do so was not in violation of the August 1 order. To reach any other conclusion, it argues, would render meaningless the entire concept of PIC protection. This is because, Ameritech Michigan continues, it would eliminate the need for the direct communication to Ameritech Michigan (either orally or in writing) of the customer's intent to change intraLATA service providers.

Ameritech Michigan also asserts that there is no basis for concluding that its conduct during three-way calls was improper. Specifically, it contends that MCI failed to support its contention that Ameritech Michigan sales representatives took steps during these calls to dissuade customers from switching to MCI's intraLATA service. It goes on to claim that, notwithstanding MCI's assumption to the contrary, the August 1 order does not bar the use of confidential customer information during those calls. Finally, Ameritech Michigan argues that even if the Commission concludes that some violations did occur, MCI's claim for compensatory damages is based entirely on conjecture and unsupported speculation.

IV.

DISCUSSION

As occurred in Case No. U-11038, the parties' rhetoric frequently exceeds the scope of this proceeding. This is particularly true with regard to assertions by Ameritech Michigan that any decision adverse to its position in this case will destroy PIC protection and be tantamount to blessing the practice of slamming. Despite Ameritech Michigan's assertions, this case is not about whether slamming is unlawful or undesirable. As stated in the August 1 order, it is both. Moreover, it is not about whether Ameritech Michigan's PIC protection program is appropriate or unreasonable as a whole. Instead, this case is about whether certain steps that Ameritech Michigan took in implementing that program violated the August 1 order.

As noted in previous Commission orders, the Act is designed in significant part to establish a regulatory structure in which full and fair competition among service providers will serve to ensure that rates for certain services (including intraLATA toll service) are not unreasonable. Therefore, Ameritech Michigan's repeated assertion that the benefits of PIC protection can only be preserved by ruling against MCI in this case effectively asks the Commission to sacrifice intraLATA competition at the alter of PIC protection. This, the Commission concludes, it cannot do.

Change Orders Based on TPV or LOA

The ALJ found no justification for requiring MCI to participate in three-way calls as a prerequisite to having Ameritech Michigan process intraLATA change orders on accounts for which PIC protection has been implemented. According to the ALJ, "the basic issue" addressed by the August 1 order concerned whether there was "verification that a customer does indeed wish to switch interexchange carriers." PFD, p. 10. Nevertheless, he noted, Ameritech Michigan's

insistence on using three-way calls does not aid the verification process, "but instead serves only to deter customers who desire to switch carriers." Id. Based on his reading of the August 1 order, the ALJ recommended finding that customers subscribing to Ameritech Michigan's PIC protection program remain free to change intraLATA service providers through the use of TPV or LOA.

Ameritech Michigan excepts, arguing--among other things--that adopting the ALJ's recommendation would render PIC protection a nullity and thus conflict with the August 1 order. According to Ameritech Michigan, the August 1 order expressly envisioned that Ameritech Michigan would be able to apply its proposed form of intraLATA PIC protection to its customers' accounts, albeit following a six month moratorium. In support of this argument, Ameritech Michigan cites Paragraph D on page 24 of the August 1 order, which states:

> Ameritech Michigan shall apply PIC protection requests received beginning in December 1995 only to interLATA service. It shall not apply PIC protection requests to intraLATA and basic local exchange services until six months after mailing the corrective bill insert unless the customer has first affirmatively selected a provider for those services and then requests PIC protection.

Because the six month period referred to in that paragraph ended on March 31, 1997, Ameritech Michigan continues, it was "under *no* prohibition in applying its customers' PIC protection to intraLATA PIC changes" from April 1, 1997 to the present. Ameritech Michigan's exceptions, p. 11 (emphasis in original). Ameritech Michigan therefore contends that from that day forward, it was free to reject any intraLATA change order verified through the use of TPV or LOA where the account had PIC protection and, instead, could require the use of a three-way call. It thus argues that the ALJ's conclusion to the contrary must be rejected.

In response, MCI asserts that PIC protection is not nullified by allowing TPV to be used to verify a customer's intent to change service providers. For example, MCI notes that "to change PICs on any account, TPV (in the absence of a PIC Freeze) is not required on in-bound tele-

marketing." MCI's replies to exceptions, p. 9. MCI therefore claims that by requiring the use of TPV in those situations, Ameritech's PIC protection program could still be used to reduce the risk of slamming.

MCI goes on to argue that Ameritech Michigan's exclusive reliance on page 24, Paragraph D of the August 1 order "conveniently overlooks the implications of other portions of the order." MCI's replies to exceptions, p. 12. Specifically, MCI refers to Paragraph F on page 25 of the August 1 order, which states:

> Ameritech Michigan shall permit the verification of PIC changes by any procedure approved by the Commission's March 10, 1995 order in Case No. U-10138 and shall also permit three-way conference calls with the consent of the customer.

MCI points out that Paragraph D focused exclusively on when Ameritech Michigan's PIC protection program would take effect and what services it would cover. In contrast, it continues, Paragraph F addressed the issue that is at the heart of the current complaint, namely how requests for intraLATA PIC changes should be verified for customer accounts that have PIC protection. According to MCI, it is important to note that Paragraph F, which authorizes the use of TPV and LOA to verify a customer's intent to switch providers, has no applicable time limitation. Thus, it asserts, no justification exists for Ameritech Michigan's decision to cease accepting either TPV or LOA as adequate verification on and after April 1, 1997.

Finally, MCI argues that the August 1 order found Ameritech Michigan's PIC protection plan to be anticompetitive because it would require customers to contact both the new service provider and Ameritech Michigan before having its service switched to the new provider. According to MCI, "it would make no sense" for the Commission to conclude that the PIC protection program was anticompetitive due to its requirement of a double contact, and then authorize Ameritech Michigan to implement a program that retains "the same cumbersome double contact process [that]

the Commission had determined to be anticompetitive." Id., p. 14. For all of these reasons, MCI asserts that the Commission should reject Ameritech Michigan's exception, adopt the ALJ's recommendation, and find that Ameritech Michigan violated the August 1 order by refusing (on and after April 1, 1997) to process intraLATA PIC change orders that were verified by TPV or LOA.

The Commission agrees with the ALJ and MCI, and concludes that Ameritech Michigan violated the August 1 order by refusing to process intraLATA PIC change orders that had been verified by TPV or LOA. In reaching this conclusion, the Commission finds that Ameritech Michigan misinterprets the guidelines established, as well as the actions prohibited, by that order.

The portion of the August 1 order relied upon by Ameritech Michigan--Paragraph D on page 24--addresses the questions of (1) when Ameritech Michigan's PIC protection would take effect and (2) what specific services that protection would cover. However, those matters are not in dispute here. Instead, the question in this complaint (namely, whether it was proper for Ameritech Michigan to reject PIC change orders that were verified through TPV or LOA) involves the issue of how requests for intraLATA PIC changes should be verified for accounts that have PIC protection. As correctly noted by MCI, that issue is covered by Paragraph F on page 25 of the August 1 order, which (in addition to authorizing the use of three-way calls) specifically directed Ameritech Michigan to "permit the verification of PIC changes by any procedure approved by the Commission's March 10, 1995 order in Case No. U-10138." Because the Commission's order in Case No. U-10138 adopted the four verification procedures approved by the FCC's January 9, 1992 order in CC Docket No. 91-64 (See March 10, 1995 order, p. 36), and because TPV and LOA were included among those four options, the August 1 order prohibited Ameritech Michigan from using its PIC protection program to reject intraLATA PIC change orders that were verified by TPV or LOA.

The Commission's conclusion is further supported by language contained in the body of the August 1 order. In discussing the steps that it felt were necessary to protect intraLATA competition and to undo the harm caused by the December 1995 bill insert, the Commission stated:

> Fourth, if a customer with PIC protection calls to change providers, Ameritech Michigan shall not use that contact to try to persuade the customer not to change providers. Fifth, Ameritech Michigan shall permit the verification of PIC changes by any procedure approved by the Commission's March 10, 1995 order in Case No. U-10138. *Ameritech Michigan is not free to invalidate PIC change procedures that the FCC and the Commission have approved.* In addition, it shall permit verification by the use of three-way conference calls with the consent of the customer.

August 1 order, p. 22 (emphasis added). Because rejecting PIC change requests that have been verified by TPV or LOA invalidates two of the four previously approved PIC change procedures, Ameritech Michigan's proposed interpretation of the August 1 order directly conflicts with the language quoted above. Likewise, that interpretation conflicts with language in the order stating that the option of using three-way calls to verify PIC change requests for accounts that have PIC protection was to be "in addition" to the use of TPV, LOA, or any other procedure approved by the FCC and the Commission. Id.

The Commission therefore adopts the ALJ's recommendation and finds that customers subscribing to Ameritech Michigan's PIC protection program remain free to change intraLATA service providers through the use of TPV or LOA.[5] The Commission further concludes that Ameritech Michigan's refusal to process TPV- or LOA-based intraLATA PIC change orders, which has been occurring since April 1, 1997, is in direct violation of the August 1 order.

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[5]Moreover, nothing in this ruling prevents PIC protection customers from likewise relying on three-way calls (or either of the other two verification procedures that were previously approved by the FCC and the Commission) as a valid means of changing service providers.

Improper Actions During Three-Way Calls

As noted earlier, Count II of MCI's complaint involved allegations of misconduct with regard to the use of three-way calls. MCI asserted that in response to mounting complaints by its employees, Todd A. Gerdes, its Executive Director of Mass Market Sales, began monitoring some of the three-way calls placed from MCI to Ameritech Michigan. As a result of his investigation, Mr. Gerdes testified that Ameritech Michigan's service representatives sometimes refused to participate in these calls. He further asserted that when they did participate, they frequently used these three-way calls as an opportunity either to dissuade the customer from changing intraLATA service providers or to sell the customer other Ameritech Michigan services and features. Mr. Gerdes went on to state that, in the course of these calls, Ameritech Michigan's service representatives have used confidential customer data to bolster their efforts to retain customers and to sell additional services. Based on this testimony, MCI asserted that Ameritech Michigan should be found in violation of the August 1 order.

Ameritech Michigan responded to that portion of the complaint by arguing that MCI offered insufficient evidence to support the allegations of improper conduct. Specifically, it noted that although MCI sought to corroborate Mr. Gerdes' testimony through the introduction of call reports,[6] those reports were ultimately excluded by the ALJ. See 8 Tr. 783. Thus, Ameritech Michigan asserted, MCI was left solely with Mr. Gerdes' account of what was taking place during those calls. It went on to assert that because that testimony covered only a small percentage of all three-way calls in which Ameritech Michigan's service representatives have been involved, no

[6]The term "call reports" refers to written summaries of three-way calls that MCI's service representatives have been instructed to prepare whenever they feel that a competing company's agents (in this case, Ameritech Michigan's service representatives) have handled three-way calls in an improper manner.

accurate conclusions could be drawn from it regarding the general conduct of Ameritech Michigan's employees. Finally, Ameritech Michigan argued that nothing in the August 1 order precludes its employees from selling other services during three-way calls or suggests that its service representatives are not free to use information from the customers' service records in the course of those conversations.

The ALJ agreed with MCI concerning the allegations contained in Count II. He stated that even with the exclusion of the call reports, which were marked as proposed Exhibits C-30 and C-33, "the record demonstrates improper action by Ameritech Michigan service representatives" during three-way calls. PFD, p. 22. According to the ALJ, this conclusion was supported by testimony from Mr. Gerdes (who disclosed that while monitoring three-way calls involving these two companies, he personally witnessed situations where Ameritech Michigan's service representatives refused to participate, placed parties on hold for over 5 minutes, initiated discussions regarding the ramifications of changing carriers, discussed confidential billing and call pattern data, and attempted to sell additional products), as well as by statements from Ameritech Michigan service representatives Keith Breidinger and Eulalia Miller (who conceded to advising customers about how changing carriers would affect their costs and challenging them to compare rates, respectively).

Because several of these activities served to discourage customers from changing service providers, the ALJ continued, they violated the Commission's directive that:

> [I]f a customer with PIC protection calls to change providers, Ameritech Michigan shall not use that contact to try to persuade the customer not to change providers.

August 1 order, p. 22. The ALJ likewise concluded that the use of confidential information by Ameritech Michigan's service representatives was in direct contravention of the Commission's statement (found in footnote 14 of the August 1 order) that:

> Ameritech Michigan will need to find a way to verify the identity of the customer that does not require the disclosure of confidential information. If it must discuss confidential or proprietary information with the customer, it may do so in another telephone conversation.

August 1 order, p. 22, n. 14. He therefore recommended that the Commission find in favor of MCI with regard to the allegations contained in Count II of the complaint.

Ameritech Michigan excepts to the ALJ's recommendation. In so doing, it reasserts that insufficient evidence was offered to support the conclusion that its service representatives have been acting in an improper manner. According to Ameritech Michigan, information provided by MCI shows that the two companies are involved in approximately 5,000 such calls each month. Nevertheless, it continues, the testimony offered by Mr. Gerdes was based on his having monitored a total of 60 three-way calls between MCI and Ameritech, only 15 to 20 of which involved customers located in Ameritech Michigan's service territory.[7] Furthermore, the statements of Mr. Breidinger and Ms. Miller refer to only a few of the hundreds of three-way calls handled by them during their tenure as service representatives. Ameritech Michigan therefore argues that no reasonable conclusions can be drawn about the overall actions of its sales representatives from such a small sample of calls.

Ameritech Michigan goes on to contend in its exceptions that Mr. Gerdes is not a credible witness. Specifically, it claims that his testimony should be ignored because (1) he cannot remember all the names of the customers and the Ameritech Michigan service representatives that participated in the three-way calls he monitored, (2) he is an employee of MCI, and therefore has a built-in bias for MCI and against Ameritech Michigan, and (3) he threw away his original notes concerning the

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[7]The remaining 40 to 48 calls monitored by Mr. Gerdes involved customers of Ameritech Michigan's affiliates in Indiana, Illinois, Ohio, and Wisconsin.

three-way calls he monitored. Finally, Ameritech Michigan argues that although the PFD specifies several types of conduct through which its service representatives purportedly violated the August 1 order (such as disclosing proprietary information, asking customers whether they will be getting a lower rate by switching service providers, and inquiring as to whether they want to purchase additional services), that order contains no mention of those specific acts. Instead, Ameritech Michigan asserts, the August 1 order "only prohibits Ameritech Michigan from trying to dissuade the customer from changing his or her inter or intraLATA provider during the call." Ameritech Michigan's exceptions, p. 21. Because the alleged actions of its service representatives do not fall within that "single, limited, and very explicit directive," Ameritech Michigan claims, they cannot serve as a basis for finding in favor of MCI.

The Commission concludes that these exceptions are not well taken. Notwithstanding Ameritech Michigan's assertions to the contrary, MCI is under no duty to show (through the presentation of a statistically significant sampling of its three-way calls) that Ameritech Michigan's service representatives acted in an anticompetitive manner on each and every occasion since March 31, 1997. All that is required to prevail on Count II of the complaint is for MCI to prove that, by accident or design, those service representatives repeatedly violated either the letter or the spirit of the August 1 order.

Moreover, the record contains sufficient evidence of repeated wrongdoing by Ameritech Michigan. Mr. Gerdes testified that of the approximately 60 three-way calls he personally monitored, the service representatives for Ameritech Michigan and its affiliates "acted inappropriately in every single one of them." 8 Tr. 658. Rather than simply verifying the customer's selection of MCI as its new provider of intraLATA PIC service, Mr. Gerdes stated that they frequently

> use the Three Way Calls to attempt to actively sell a competing Ameritech toll product. In other instances, Ameritech representatives will quiz customers as to the ramifications of switching to MCI. In still other instances, Ameritech representatives will hang up or flatly refuse to participate in the Three Way Calls while an MCI employee is on the line.

8 Tr. 654-655. He further stated that although only 15 to 20 of these calls directly involved Ameritech Michigan employees, the improper conduct "was substantially similar whether the party was Ameritech Michigan or some other Ameritech entity." 7 Tr. 749 and 8 Tr. 658.

Moreover, as correctly noted by the ALJ, sworn statements provided by some of Ameritech Michigan's own service representatives lend substantial support to Mr. Gerdes' observations. For example, Mr. Breidinger confirmed that, in the normal course of three-way calls, he will (1) advise customers about the effect that changing intraLATA service providers will have on their bills, (2) remind them of the $5 charge for making such a change, and (3) use information from their billing records to determine whether to offer them additional services like call waiting. Exhibit C-35. Similarly, Ms. Miller conceded that when handling a three-way call for a customer whose billing records reflect the presence of an Ameritech Michigan discount calling plan, she specifically reminded the customer about that plan and asked the customer if she knew whether MCI's proposed service would be less expensive. Exhibit C-36.

As for Ameritech Michigan's final argument, the Commission finds that the ALJ correctly assessed the scope of the prohibitions included in the August 1 order. When read in its entirety, it becomes clear that the August 1 order authorized the use of three-way calls solely as a means of verifying a PIC change and not as a vehicle for Ameritech Michigan to market its services. Furthermore, that order specifically indicated that, during three-way calls, Ameritech Michigan's service representatives are prohibited from using customer billing records for any purpose beyond verifying a customer's identity. See August 1 order, p. 22, n. 14. Thus, in addition to the more obvious ways

of making these three-way calls an unpleasant and difficult experience (like hanging up, putting parties on hold for unreasonable periods, or pressuring customers not to change carriers), Ameritech Michigan's service representatives violated the August 1 order each time they (1) asked customers whether they would be getting a less expensive rate from MCI, (2) discussed the customers' existing service plan or calling pattern, (3) inquired about whether the customers wanted additional services, (4) talked about the ramifications of changing service providers, and (5) mentioned any information contained in the customers' billing records beyond that needed to confirm the customers' respective identities.

For all of these reasons, the Commission adopts the ALJ's recommendation and finds that Ameritech Michigan violated the August 1 order by repeatedly making improper use of three-way calls.

Compensatory Damages

As noted earlier, MCI asserted that Ameritech Michigan's improper actions led to the rejection of 32,487 intraLATA PIC change orders submitted on and after April 1, 1997. MCI went on to assert that, based on Section 601 of the Act, it must be made whole for the loss of those potential customers. MCI therefore offered the testimony of Albert E. Clement, its Director of Finance, for the purpose of computing the compensatory damages arising from Ameritech Michigan's failure to properly switch those customers to MCI's intraLATA service.

Mr. Clement began by developing a formula for estimating the total net profit that MCI would have received from those customers. According to him, this could best be achieved by computing MCI's average profit per minute for intraLATA service and then multiplying that figure by the estimated number of minutes that these customers would have spent making intraLATA calls while

on MCI's system. To arrive at his number for the average profit per minute, Mr. Clement started with an estimate of the average rate per minute that MCI charges for intraLATA calls and reduced that figure to reflect the effect of (1) uncollectible accounts, (2) access charges, and (3) the estimated cost of marketing, billing, and customer service. Similarly, in developing his prediction of how many minutes of calls these customers would have made as MCI customers, he multiplied the average use per month (in minutes) for each of its existing intraLATA customers by the estimated length of time that these customers would remain on MCI's system after switching from some other provider. MCI claimed that, based on Mr. Clement's analysis, Ameritech Michigan's actions resulted in lost profits of $1,173,608. See MCI's initial brief, p. 35.

In response to MCI's claim for compensatory damages, Ameritech Michigan asserted that Mr. Clement's analysis was wholly unreliable. In support of this assertion, it cited the testimony of Van E. Conway. Among other things, Mr. Conway stated that MCI's computation of its alleged lost profits (1) ignored the effect of several classes of costs when estimating its average profit per minute, (2) overstated the number of customers that were precluded from taking intraLATA PIC service from MCI, (3) overestimated the average number of minutes of intraLATA calls that those customers would make each month, (4) underestimated the rate at which these customers would switch from MCI to another service provider, and (5) failed to consider the time value of money. Ameritech Michigan argued that due to these serious flaws in Mr. Clement's analysis, MCI's request for compensatory damages is based solely on conjecture and speculation, and must be rejected.

The ALJ agreed with Ameritech Michigan and found that MCI failed to meet its burden of proof regarding compensatory damages. From his reading of the record, the ALJ held that MCI greatly underestimated the cost of providing intraLATA service, exaggerated the profitability of its

operations, overstated the number of customers it lost as a result of Ameritech Michigan's actions, and inflated those customers' potential usage of MCI's intraLATA service. He therefore recommended that the Commission reject MCI's demand that Ameritech reimburse it for at least $1,173,608 in lost profits.

In its exceptions, MCI argues that its request for lost profits need not be established with absolute certainty. Citing Tempo, Inc. v Rapid Electric Sales & Service, Inc., 132 Mich App 93; 347 NW2d 728 (1984), it contends that Michigan's courts have long held that compensatory damages can be granted so long as the "method of calculating lost profits had a reasonable degree of certainty and was not based solely on conjecture and speculation." 132 Mich App at 103. MCI further contends that, notwithstanding the ALJ's conclusion to the contrary, the analysis presented by Mr. Clement was not too speculative to support the recovery of compensatory damages in this case. Instead, MCI asserts, he came forward with a reasonable methodology and adequate evidence to support MCI's claim for lost profits. MCI therefore requests that the Commission reject the ALJ's recommendation and award it compensatory damages of at least $1,173,608.

Based on its review of the record, the Commission concludes that MCI's request should be rejected. Although MCI need not establish the level of lost profits with absolute certainty, neither can it prevail on proofs that include excessive speculation. In this case, the ALJ correctly held that MCI's analysis was too speculative to support the recovery of compensatory damages. The Commission reaches this conclusion for the following three reasons.

First, Mr. Clement's computation of MCI's average profit per minute for intraLATA service appears to have either underestimated or ignored several important categories of expenses. For example, Mr. Clement conceded that by failing to reflect the higher percentage of charges that are never paid by customers "who are direct billed by MCI," he underestimated MCI's uncollectibles

expense. 7 Tr. 431. Similarly, although his lost profit analysis failed to include it, Mr. Clement ultimately agreed that "there is probably some general and administrative expense associated with the provision of intraLATA toll." 7 Tr. 436. Furthermore, the record indicates that although MCI offers inducements "such as rebates, flight miles, etc., to its potential customers . . . for switching long distance carriers," none of these promotional expenses have been included in MCI's analysis. 9 Tr. 905. Finally, Mr. Clement did not account for any of the costs of MCI's switching equipment, trunks, and other network facilities necessary to handle its customer's intraLATA calls. 7-A Tr. 555;[8] 9 Tr. 906. Due at least in part to its failure to recognize these costs, Mr. Clement came up with an estimated profit per minute for lost intraLATA service that was five to six times higher than the net profit margin that MCI expects on its combined interLATA and intraLATA service. See Exhibit R-29; 7-A Tr. 453.

Second, the record indicates that MCI's analysis overstates the number of customers that it was precluded from serving as a result of Ameritech Michigan's improper actions. MCI witness Mindy J. Chapman offered Exhibit C-6, documenting 32,487 instances where Ameritech Michigan improperly rejected intraLATA customer change orders submitted by MCI. However, Ms. Chapman conceded during cross-examination that of those customers whose intraLATA PIC change orders were initially rejected by Ameritech Michigan, at least 1,076 were ultimately switched to MCI. 6 Tr. 369-370. Moreover, that figure (1,076) related only to the 20,105 change orders rejected between April and August, 1997. See Exhibit C-5R. Ms. Chapman therefore went on to state that a similar downward adjustment should be made to reflect that an equal percentage of the

[8]A protective order was issued in this case on December 1, 1997. As a result, part of the hearings were conducted on a separate, confidential record. Any part of the transcript contained in the separate record is designated by the volume number corresponding to the public record created on that day, plus "-A".